

**REMARKS**

**A. Status**

Claims 6-10, 27, and 45-61 are presented for examination. Claims 1-5, 11-26, and 28-44 have been canceled. Claims 6, 8, 9, 27, and 45-56 are allowed. Claims 10 and 57-61 are allowable as amended. Claim 7 is rejected.

**B. Amendments**

Claims 10, 27, and 61 have been amended to clarify that the weights are based on the weight of the cocoa solids.

**C. §112, 2<sup>nd</sup> Paragraph Rejection of Claim 10**

Claim 10 is rejected under 35 U.S.C. 112, 2<sup>nd</sup> paragraph as indefinite because Claim 10 contains the recitation “or wherein” in the third line from the bottom making it unclear what is intended by the “wherein” clause.

In view of the amendment of Claim 10 to rewrite “or” as “and”, the rejection is moot.

**D. §103(a)/§102(e) Rejection of Claim 7 Over U.S. 6,599,553**

Claim 7 is rejected under §103(a) as obvious over U.S. 6,599,553 (Kealey et al.). The Examiner is relying on the earlier U.S. filing date of the ‘553 patent. The Examiner notes that the rejection may be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor(s) of this application and is thus not an invention “by another” (2) by a showing of a date of invention for the claimed subject matter prior to the effective U.S. filing date of this patent; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the

inventor(s) named in the applications are the prior inventor(s) under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). The rejection may also be overcome by showing that the references is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a).

According to the Examiner, the '553 patent discloses a chocolate dry drink mix containing an emulsifier and a cocoa procyanidin (Claim 1). The Examiner points out that the procyanidin contents of the varied cocoa products shown in Table 4 appear to fall within the claimed ranges and that the cocoa polyphenols were added to a variety of foods as shown in Table 1A. The Examiner notes that the lecithin content of the drink shown at the top of column 52 appears to be within the claimed range. Although the drink mix is not described as a food additive or a food supplement, the Examiner believes it would have been obvious at the time of Applicants' invention to utilize the cocoa of the '553 patent in a chocolate or cookie formulation.

**E. Applicants' Response to §103(a)/§102(e) Rejection Over U.S. 6,599,553**

It is respectfully pointed out that the Examiner has misread Claim 1 of the '553 patent. Claim 1 covers a dry drink mix comprising (i) a cocoa polyphenol (CP)-rich cocoa powder, an alkalinized cocoa powder, and a sweetener. Claim 4 (3)(1) covers a dry drink mix further comprising vanillin, lecithin (as an emulsifier), and a malt powder.

The cocoa products of Table 4 are defatted cocoa powders where the cocoa procyanidins (i.e., cocoa polyphenol) levels vary with the degree of fermentation. The fermentation time varied from  $t_0$  (zero hours - Sample A) to  $t_{120}$  (120 hours - Sample E). The finished products in table 1A are made with the cocoa polyphenol (CP) ingredients shown in Table 1B which include an extract, a cocoa powder, and a chocolate liquor.

None of the cocoa ingredients include cocoa solids pretreated with lecithin. As can be seen by a review of Examples 10 through 31, the CP ingredients used were CP cocoa powder and CP liquor (Example 10 - Tables 11 and 12), a CP cocoa powder and an alkalized cocoa powder (Example 11), CP chocolate liquor (Examples 12 and 15), CP cocoa powders (Examples 13, 16, 18, 20-24, and 26-31), and CP extract (Examples 14, 17, 19, and 25).

Nowhere in the '553 patent is there a suggestion to pretreat partially defatted or fully defatted cocoa solids by mixing the cocoa solids with about 0.05 to about 5 wt% of lecithin before adding the cocoa solids to a food or a food supplement. When lecithin was used in the examples of the '553 patent, it was added to a refined mixture of cocoa powder, sugar, and cocoa butter which was dry conched before the lecithin and vanillin were added.

Partially or fully defatted cocoa solids pretreated with specific amounts of lecithin for use as an additive in a food or food supplement are not obvious over the teachings of the '553 patent which teaches adding lecithin to a conched chocolate mixture containing cocoa powder, sugar, and cocoa butter.

**F. §103(a) Rejection Over U.S. 6,194,020 or U.S. 6,399,139**

Claim 7 is rejected under 35 U.S.C. 103(a) as obvious over U.S. 6,194,020 or U.S. 6,399,139 (Myers et al.). According to the Examiner the '020 and the '139 patents disclose cocoa polyphenols for use in confectioneries. At column 7, lines 46-50 of the '020 patent and at column 7, lines 44-48 of the '139 patent chocolate liquor is described as containing the claimed cocoa procyanidins. At column 25 of the '020 patent and Example 8 of the '139 patent a chocolate formulation including lecithin is shown. The

Examiner notes that the present claims appear to differ from Myers et al. in the recitation of the use of chocolate as an additive. The Examiner points out that chocolate is a well-known ingredient in cake and cookie recipes. Hence, the Examiner believes that it would have been obvious to one of ordinary skill in the art to use the chocolate of the '553 patent as an additive in a cake formulation.

**G. Applicants' Response to §103(a) Rejection Over U.S. 6,194,020 or U.S. 6,399,139**

It is respectfully pointed out that the lecithin used in the '020 and '139 patents is not used to pretreat the cocoa solids. In Example 4 the lecithin and fat were mixed and the mixture was then added to granulated sucrose; then the remaining ingredients including the chocolate liquors were added. The dark chocolates of Example 5 to 8 were prepared in a similar manner using (i) a high cocoa polyphenol (CP) chocolate liquor, (ii) a regular chocolate liquor and high CP chocolate liquor, or (iii) a high CP chocolate liquor and a high CP cocoa powder. The milk chocolate of Example 9 was prepared by mixing at least 21% of the fat and at least 30% of an emulsifier (unidentified), adding the mixture to sucrose and milk, and then adding a high CP chocolate liquor.

Partially or fully defatted cocoa solids pretreated with lecithin for use as an additive for foods or food supplements are not obvious over the teachings of the '020 or '139 patents which teach mixing lecithin with fat and then sugar before adding the cocoa ingredients.

**H. Closing**

The Examiner is thanked for the allowance of Claims 6, 8, 9, 27, and 45-56.

Claim 7 was previously allowed. Why is it now rejected?

Entry of this amendment and an early allowance is respectfully requested. No new matter is presented.

**I. Correspondence and Fees**

In the event that any fees are required, authorization is hereby given to charge Deposit Account No. 03-3839.

Please address all correspondence to Intellectual Property Docket Administrator, Gibbons, P.C., One Gateway Center, Newark, NJ 07102.

Should there be any questions or other matters that may be resolved by a telephone call, the Examiner is invited to contact the undersigned attorney at the telephone number provided below.

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Respectfully submitted,

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